Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

THEODORE MICHAEL BREWSTER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE FINDING OF THE DISTRICT COURT, NAMELY, THAT PETITIONER OBSTRUCTED JUSTICE PURSUANT TO GUIDELINE 3C1.1, WAS CLEARLY ERRONEOUS

2. WHETHER THE FINDING OF THE DISTRICT COURT, NAMELY, THAT PETITIONER WAS EITHER A SUPERVISOR OR MANAGER WITHIN GUIDELINE 3B1.1, WAS CLEARLY ERRONEOUS

3. WHETHER TRIAL COUNSEL FOR PETITIONER RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL, BASED UPON THE STANDARDS SET FORTH IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

4. WHETHER THE DISTRICT COURT ERRED IN FAILING TO SUPPRESS THE TESTIMONY OF A CO-DEFENDANT BECAUSE SUCH WITNESS WAS PROMISED LENIENT TREATMENT BY THE GOVERNMENT IN VIOLATION OF 18 U.S.C. § 201(c)(2)

5. IF A CO-DEFENDANT SHOULD NOT HAVE TESTIFIED AS A GOVERNMENT WITNESS, WHETHER THE APPLICATION OF 18 U.S.C. § 201(c)(2) SHOULD BE APPLIED RETROACTIVELY

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PETITION FOR A WRIT OF CERTIORARI

THEODORE MICHAEL BREWSTER, by and through his attorney of record, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is attached hereto as Appendix B, pages 1-2. This opinion is not being reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1999. No petition for rehearing was filed. Jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sentencing Guideline 3B1.1.

Sentencing Guideline 3C1.1.

18 U.S.C. § 201(c)(2).

Fed.R.Crim.P. 12.3.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

Course of Proceedings and Disposition Below

Petitioner was indicted, in a two count indictment, for possession of marijuana with intent to distribute, such offenses allegedly occurring on February 4, 1998 and February 11, 1998 (R. 1 3-4). Trial was to a jury, with Petitioner being found guilty on both counts (R. 2 106-107). Petitioner was sentenced to 122 months imprisonment as to each Count, with the sentences in Counts One and Two running concurrently, a special assessment fee to the Crime Victims' Fund of $200.00 was imposed (R. 2 157), and Petitioner was placed on supervised release for three years as to Count One and five years as to Count Two, to run concurrently (R. 2 159).

Timely notice of appeal was given by Petitioner (R. 2 163). The Fifth Circuit Court of Appeals affirmed both the conviction and sentence.

Statement of Facts.

Petitioner is a man in his mid-40's, who resides some 15 miles south of Van Horn, Texas, in far west Texas, having lived in Van Horn since he was three years old (Tr. Jury Trial 3 394). The testimony of Petitioner, whose defense was "public necessity" as set forth in Fed.R.Crim.P. 12.3, may be summarized as follows.

Petitioner himself testified that he met DPS Narcotics Officer Bruce Jackson in 1996 and informed Jackson about

200 pounds of marijuana and 10 kilograms of cocaine stashed in a truck/trailer behind a nearby golf course (Tr. Jury Trial 3 395-396); on November 15, 1996, Petitioner again talked to Narcotics Officer Jackson regarding Arnulfo Urias, nicknamed "Chiccaron", whose associates were getting ready to move 100 pounds of marijuana to Odessa, with Petitioner relaying such information to Officer Jackson, including giving a description of the vehicles and license plate number regarding the actual transportation of such marijuana by "Chiccaron" (Tr. Jury Trial 3 397-400); Petitioner went to Mexico several times for the purpose of providing confidential information to the narcotics officers with the Texas Department of Public Safety, including meeting with Officer Zeke Rodarte, with Petitioner taking with him a hired hand named Jesus Melendez, who would also be set up as a confidential informant (Tr. Jury Trial 3 400-408; 417); Petitioner went to Mexico four or five other times, with Officer Rodarte being aware that Petitioner was in Mexico, with Petitioner reporting to Rodarte each time he met with someone in Mexico, and that Petitioner met with Ismael Ispudo in Van Horn, Texas (Tr. Jury Trial 3 408); Petitioner went to Ojinaga to meet with Hippie Ramos, of the Ramos' drug organization, including regarding the transportation of one ton of marijuana forty miles south of Van Horn (Tr. Jury Trial 3 406-407); this transportation was supposed to have had surveillance from Officer Rodarte (Tr. Jury Trial 3 407); Petitioner gave other information to both Officer Jackson and Officer Rodarte, with Jackson acting on most of the information that Petitioner provided (Tr. Jury Trial 3 409-410); Petitioner told Officer Jackson about 1,500 pounds of marijuana that was moved

by the Hippie Ramos' drug organization (Tr. Jury Trial 3 418); Petitioner went to Odessa regarding the February 4, 1997 arrest, to serve only as a confidential informant and indeed called his brother, Don Brewster, who paged Officer Rodarte numerous times, and subsequently asked his brother if he had contacted Rodarte (Tr. Jury Trial 3 419-441), with Petitioner never knowing exactly what happened in Odessa on February 4, 1997 until February 26 or 28, 1997, when Petitioner met with Officer Jackson (Tr. Jury Trial 3 441); regarding Petitioner's February 11, 1997 arrest, Petitioner received a phone call from Hippie Ramos via Ismael Ispudo, regarding a load of marijuana coming from Chihuahua, Mexico to Odessa, and the person who received such marijuana, Jose, was a person whom Petitioner was convinced was working for Hippie Ramos (Tr. Jury Trial 3 457-461), and Petitioner was going to call Officer Rodarte and inform him of a load going down the road but was arrested by DPS Trooper Lujan before Petitioner could make such call (Tr. Jury Trial 3 462-466); and, on February 14, 1997, Petitioner received a call from Mr. Nieto, with Petitioner calling Officer Jackson, because the February 11, 1997 load of marijuana was apparently a Nieto load, rather than a Ramos load (Tr. Jury Trial 3 470-473).

Petitioner did drive to Odessa, Texas, spending the night at the Best Western Motel on February 3, 1997, having a man named Sanchez with him, never transported any marijuana from Van Horn to Odessa, was not involved in an attempted sale of marijuana at a 7-11 store in Odessa, Texas, in which Gilberto Perez-Herrera and Juan Mendoza were arrested when attempting to sell marijuana to an undercover officer. While in Odessa,

Petitioner did talk to Ismael Ispudo, of whom Petitioner was trying to gather information, and revealed to the DPS narcotics officers (Tr. Jury Trial 3 420-426). The Petitioner came back to Van Horn (Tr. Jury Trial 3 426). Regarding the February 11, 1997 arrest near Van Horn, Petitioner saw Jose Alfredo Corrales load 13 bundles of marijuana into the back seat of Corrales' vehicle, with Petitioner convinced that Corrales (who at the time Petitioner thought was named Jose Ramos) worked for Hippie Ramos, of whom Petitioner was gathering information as a confidential informant to assist DPS narcotics officers, later saw Corrales driving down Highway 90 near Van Horn, saw the car that Corrales was driving swerve off into the bar ditch, identified the driver as Corrales (at the time, Petitioner thought his name was Ramos) and told Corrales "you're not going to make it anywhere – you're drinking" (Tr. Jury Trial 3 457-462). Subsequently, a DPS Trooper came down the road, and stopped the vehicle Corrales was driving (Tr. Jury Trial 3 463), and Petitioner was subsequently pulled over as well, with there being no evidence that Petitioner tried to flee from Trooper Lujan (Tr. Jury Trial 3 463).

Petitioner's brother, Don Brewster, testified that, with regard to the incident in Odessa, Texas (Count One), Petitioner realized, once in Odessa, that a "drug deal" was apparently going down, and Petitioner telephoned Don Brewster on February 4, 1997 to page DPS Narcotics Officer Zeke Rodarte to let him know what was going on (Tr. Jury Trial 3 381-383; 439-440).

A Government witness was Bruce Jackson, a Texas Department of Public Safety Narcotics Officer. Jackson testified that Petitioner began serving as a confidential

informant and source of information, for the purpose of assisting law enforcement regarding drugs, on either July 4, 1995 or Labor Day, 1995 (Tr. Jury Trial 2 188-192). Jackson testified that on January 15, 1996, Petitioner provided information that a certain vehicle was being driven east of Van Horn, Texas, with drugs inside such vehicle, that Jackson caught up with such vehicle and seized 195 pounds of marijuana in the back seat of such vehicle, and arrested the individual driving (Tr. Jury Trial 2 189-196). Jackson further testified that, beginning on November 15, 1996, he contacted Petitioner about one to three times per week, on average, with the Petitioner giving information (Tr. Jury Trial 2 196-197). Jackson further had two El Paso narcotics officers talk with Petitioner, including how a wireless transmitter would be installed on Petitioner or in Petitioner's vehicle (Tr. Jury Trial 2 198). Jackson subsequently talked to Petitioner regarding what happened in Odessa, Texas on February 4-5, 1997, and Jackson had two investigators from El Paso with him when Petitioner was interviewed (Tr. Jury Trial 2 199-206), with the officers obtaining a telephone number from inside Petitioner's billfold (Tr. Jury Trial 2 202). According to Jackson, Petitioner never called regarding the load taken to Odessa (Tr. Jury Trial 2 208-209). Petitioner talked to Jackson regarding the February 11, 1997 arrest, in which marijuana was seized from the vehicle Jose Alfredo Corrales was driving (Tr. Jury Trial 2 210-213). Additionally, Petitioner told Jackson information regarding the "Ramos drug organization" (Tr. Jury Trial 2 215), and read the written statement of Petitioner to the jury (Tr. Jury Trial 2 213-217).

Zeke Rodarte, a Texas Department of Public Safety narcotics officer, testified that Petitioner provided information, and assisted law enforcement officers regarding the Ramos drug organization, with his first meeting with Petitioner on October 4, 1996 in Alpine, Texas (Tr. Jury Trial 3 318-319; 323). Rodarte went over certain rules of the Department of Public Safety with Petitioner (Tr. Jury Trial 3 319-320). Rodarte met with Petitioner three times and Petitioner did, indeed, provide information to Rodarte regarding the Ramos drug organization (Tr. Jury Trial 3 321). Moreover, Rodarte testified that Petitioner was to meet with Ismael Ispudo, who was a known drug dealer, and also Petitioner was to meet with Hippie Ramos and Reynaldo Ramos regarding marijuana coming to Van Horn (Tr. Jury Trial 3 324-326). Rodarte indicated that the information Petitioner provided was general rather than concrete (Tr. Jury Trial 3 328), and Petitioner never told Rodarte with regard to the seizure of marijuana in Odessa on February 4, 1997 (Tr. Jury Trial 3 328). Officer Jackson called Rodarte after Petitioner was arrested on February 11, 1997 in Van Horn (Tr. Jury Trial 3 330-332).

An auto mechanic from Van Horn, Texas, Manuel Lopez-Ramirez, testified that he loaned a suburban vehicle to Linda Balcazar on December 30, 1996, because Lopez-Ramirez told Linda Balcazar that it would take some three weeks to repair her vehicle (Tr. Jury Trial 2 144-146). Lopez-Ramirez purchased the vehicle from John Hannon (Tr. Jury Trial 2, 158-159). The suburban was subsequently seized.

Texas Department of Public Safety Trooper Robert Lujan testified that, during the late evening on February

11, 1997, he was driving on Highway 90 between Van Horn, Texas and Marfa, Texas, and noticed that there were two cars in the bar ditch with two men standing outside the vehicles in the dark, and stopped to render assistance (Tr. Jury Trial 2 171-173), when one vehicle left in a hurry and was subsequently stopped after chasing this vehicle for several miles (Tr. Jury Trial 2 173-175). The driver, Jose Alfredo Corrales, was intoxicated (Tr. Jury Trial 2 176-178), with Corrales being arrested for driving while intoxicated (Tr. Jury Trial 2 178). A drug sniffing dog was summoned, who subsequently alerted to drugs at the left rear of this vehicle (Tr. Jury Trial 2 178). Thirteen packages of marijuana were found inside the vehicle by a Border Patrol Officer Lonnie Hillan, who came to assist Trooper Lujan (Tr. Jury Trial 2 183). The driver of the other vehicle was Petitioner, who was subsequently stopped, although Lujan never testified that Petitioner ever tried to flee (Tr. Jury Trial 2 173-174; 184).

The driver who was first stopped, and who was arrested for driving while intoxicated and drove the vehicle containing 13 packages of marijuana, was Jose Alfredo Corrales, who testified that he was asked by Freddie Arriega to deliver marijuana and had delivered marijuana for Arriega before (Tr. Jury Trial 3 298-301). Corrales was paid $100.00 to transport more marijuana on February 11, 1997, had been drinking earlier on February 11th, and drove Freddie Arriega's vehicle (Tr. Jury Trial 3 301-303). When Corrales arrived in Van Horn he went to "Mike's house", and "Mike" was Petitioner. Corrales followed Petitioner down a farm road to a barn, with marijuana then being loaded into Corrales' vehicle (Tr. Jury Trial 3 303-309). Petitioner suggested that Corrales spend

the night in Van Horn because of Corrales' intoxication (Tr. Jury Trial 3 309). Corrales was stopped by a DPS Trooper (Tr. Jury Trial 3 309-310). Corrales further testified that he had previously pled guilty to possession of marijuana, and was to be sentenced in the United States District Court for the Western District of Texas at a later date based upon the arrest during the evening of February 11, 1997 by Trooper Lujan (Tr. Jury Trial 3 298; 299-310).

Jeffrey Collins, a Department of Public Safety narcotics officer from El Paso, also testified, especially coming to Van Horn on February 5, 1997, to meet with Bruce Jackson and Petitioner. Collins testified that a telephone number was found which Petitioner was not terribly willing to hand over (Tr. Jury Trial 3 285-287). Collins was trying to get Petitioner to make a controlled delivery of marijuana in Midland from Mr. Nieto, a contact Petitioner had made in Mexico, which is where marijuana was being transferred to from Mexico (Tr. Jury Trial 3 283). Additional testimony regarding Jeffrey Collins is set forth in Proposition Three below.

While Rodarte was investigating the Ramos drug organization, Jackson (and Collins) were investigating the Nieto drug organization (R. 2 138-156).

The testimony of Gilberto Perez-Herrera, a co-defendant, is summarized in Proposition Four.

REASONS FOR GRANTING PETITION

This case presents important questions concerning (1) whether the finding of the District Court, namely, that Petitioner obstructed justice pursuant to Guideline 3C1.1, was clearly erroneous; (2) whether the finding of the District Court, namely, that Petitioner was either a supervisor or manager within Guideline 3B1.1, was clearly erroneous; (3) whether trial counsel for Petitioner rendered the ineffective assistance of counsel, based upon the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); (4) whether the District Court erred in failing to suppress the testimony of a co-defendant because such witness was promised lenient treatment by the government in violation of 18 U.S.C. § 201(c)(2); and, (5) if a co-defendant should not have testified as a government witness, whether the application of 18 U.S.C. § 201(c)(2) should be applied retroactively.

As to the First Question Presented, the District Court was clearly erroneous in finding that Petitioner obstructed justice under Guideline 3C1.1 and by adding two levels to the total offense level.

Guideline 3C1.1 states as follows:

> "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense, increase the offense level by 2 levels."

In pertinent part, the Revised Pre-Sentence Investigation Report, prepared by a United States Probation Officer, states as follows:

"ADDENDUM TO THE PRE-SENTENCE REPORT
OBJECTIONS BY THE GOVERNMENT

The government has filed the following objections:

I

> The government submits the defendant deserves an upward adjustment for obstruction of justice based on the defendant's testimony which was false and his impeding of the investigative efforts of law enforcement officers.
>
> The government's objection has merit and the appropriate changes have been made."

An objection was made by adding two levels for obstruction of justice (Tr. Sentencing 1-4). A hearing was held on such objection, and the District Court overruled this objection (Tr. Sentencing 4-6). By denying such objection, the District Court added two levels to the total offense level.

The totality of the evidence, with regard to determining whether Petitioner obstructed justice, are as follows: Petitioner merely denied knowledge of guilt as to both the arrest on February 4, 1997 and the arrest on February 11, 1997 (Tr. Jury Trial 2 416-468); Department of Public Safety Officer Bruce Jackson *did not believe* Petitioner's story regarding his involvement as to Count One and Count Two (Tr. Jury Trial 2 212); and, it is very apparent DPS Officer Rodarte did not believe Petitioner either, since Rodarte refused to talk to Petitioner on February 13, 1997 and, indeed, told Petitioner that the only way Officer Rodarte would talk to him, regarding the marijuana arrest made on February 4, 1997 and February 11, 1997,

would be upon Petitioner's agreement to plead guilty to these allegations for which Petitioner stood trial (Tr. 3 350-351). And, there is *no evidence* that either Jackson or Rodarte, nor any other officer, put forth any extra effort whatsoever; and (3) the only statements made by Petitioner under oath were at the jury trial.

The key requirement, pursuant to Guideline 3C1.1 and obstruction of justice, as set forth in Application Note 3(g), is that a defendant's statement or conduct result in a *significant* hindrance to the investigation. Because there was no evidence that either narcotics officers Bruce Jackson or Zeke Rodarte, or any other officer, believed Petitioner, and since there is no evidence any officer put forth any investigative efforts because of what Petitioner told them, *there is no evidence that the investigation was "significantly" hindered.* The key element of Guideline 3C1.1 is that a defendant *significantly* hindered the investigation. And, the Government has the burden of proving, by a preponderance of the evidence, the applicability of a Guideline Section which would enhance or increase the offense level. *United States v. Shriver*, 967 F.2d 572 (11th Cir. 1992). And, *the evidence must be viewed*, with regard to whether a defendant has *obstructed justice under Guideline 3C1.1, in the light most favorable to the defendant. United States v. Spears*, 49 F.3d 1136 (6th Cir. 1995); *United States v. Montague*, 40 F.3d 1251 (D.C. Cir. 1994).

The District Court is required to identify which portions of the defendant's testimony the District Court finds materially perjurious. *United States v. Spears*, 49 F.3d 1136 (6th Cir. 1995); *United States v. Smith*, 62 F.3d 641 (4th Cir.

1995). And, the Court of Appeals will not infer the findings necessary to support an obstruction of justice enhancement when there are no specific findings made by the District Court. *United States v. Smith*, 62 F.3d at 646-647. Additionally, there must be a specific finding by the District Court that the defendant had the requisite intent to obstruct justice. *United States v. Reed*, 49 F.3d 895 (2nd Cir. 1995). Finally, such specific finding as to how the defendant obstructed justice must be made by *clear and convincing evidence*. *United States v. Montague*, 40 F.3d 1251 (D.C. Cir. 1994). As this Honorable Court has held, a denial of guilt by an accused to a law enforcement officer, even if such denial is a false statement, *cannot* constitute "obstruction of justice" under the Federal Sentencing Guidelines unless the statements *significantly* obstructed or impeded the investigation, *United States v. Surasky*, 976 F.2d 242 (5th Cir. 1992), and there was *no evidence* that Petitioner's denial of guilt, to any law enforcement officer, including Officers Bruce Jackson and Zeke Rodarte, significantly obstructed or impeded the investigation, *and no specific finding was made by the District Court that any investigation was significantly hindered*. See *United States v. Shriver*, 967 F.2d 572 (11th Cir. 1992) regarding the failure of the Government to prove that such false statement significantly obstructed or impeded the investigation by law enforcement.

Moreover, alleging that an accused obstructed justice by testifying untruthfully at trial puts an intolerable burden on a defendant's right to testify in his own behalf. *United States v. Craig*, 956 F.2d 65 (4th Cir. 1992); *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991).

And, flight from a police officer, prior to arrest, is not obstruction of justice under Guideline 3C1.1, *United States v. Garcia*, 909 F.2d 389 (9th Cir. 1990), although Petitioner pulled his car over when requested to do so by Texas Department of Public Safety Trooper Lujan regarding Count Two. (Tr. Jury Trial Volume 2 463).

Accordingly, because the Government failed to prove, by a preponderance of the evidence, that Petitioner *significantly* hindered the investigation, the sentence should be set aside, and the District Court directed to deduct two offense levels from the total offense level.

Accordingly, this Petition should be granted, the sentence imposed should be set aside, and the District Court directed to deduct two (2) levels from the total offense level.

As to the Second Question Presented, the District Court was clearly erroneous in finding that Petitioner was a manager or organizer, under Guideline 3B1.1, and by adding three levels to the total offense level.

Guideline 3B1.1 states, in pertinent part:

> "Based on the defendant's role in the offense, increase the offense level as follows: . . . (b) if the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by three levels."

The Revised Pre-Sentence Investigation Report, of the United States Probation Officer, states as follows:

"ADDENDUM TO THE PRE-SENTENCE REPORT
OBJECTIONS BY THE GOVERNMENT

II

The government submits the defendant deserves an upward adjustment for his role as an organizer or leader in the offenses of conviction.

There is no evidence to suggest that the defendant acted as an organizer or leader in these offenses. The government's objection does not point to which co-conspirators were acting under the defendant's direction. No evidence revealed Mr. Brewster was to receive a larger share of the "fruits" of the criminal activity for his leadership role. The evidence does support an adjustment for the defendant's role as a manager or supervisor. Mr. Brewster assisted in obtaining transportation for the marijuana load of February 4, 1997 and followed the load vehicle from Van Horn to Odessa. The defendant's numerous phone calls to Perez-Herrera's pager and the defendant's renting the hotel room in Odessa are further examples of Mr. Brewster's management of the load; however, there was no evidence that the negotiations of the co-defendants with the undercover officer were controlled by Mr. Brewster. On February 11, 1997, Mr. Brewster assisted in loading marijuana in Corrales' vehicle and had previously provided a storage location for the marijuana (defendant's barn). There was no information that Mr. Brewster exercised authority over Corrales' or Linda Balcazar. According to Corrales, he was picking up the marijuana after being directed to do so by Freddie Arriega, not the defendant. Again, this indicates that Mr. Brewster was supervising the transportation of marijuana and his role was

> also extensive but not to the point of exercising authority over Corrales.
>
> The adjustment of USSG Sec. 3B1.1(b) has been added to the Pre-Sentence Investigation Report."

An objection was made by Petitioner to the Revised Pre-Sentence Investigation Report (Tr.Sentencing 1 1-2), and a hearing was held on such objection (Tr.Sentencing 1; 5-12). Such objection was overruled by the District Court (Tr.Sentencing 12). By denying such objection, the District Court added three levels to the total offense level.

With regard to the evidence adduced at trial, such evidence may be summarized as follows: (1) Petitioner did not locate any buyer of the marijuana; (2) Petitioner did not set up the transfer or the sale of marijuana to a buyer; (3) Petitioner did not recruit either Gilberto Perez-Herrera, Juan Mendoza, or Jose Alfredo Corrales; (4) Petitioner did not pay any money to Gilberto Perez-Herrera, Juan Mendoza, or Jose Alfredo Corrales; (5) Petitioner did not order Gilberto Perez-Herrera, Juan Mendoza, nor Jose Alfredo Corrales where to go or what to do; (6) even Gilbert Perez-Herrera, when he met with Petitioner at the Best Western Motel in Odessa, Texas on February 4, 1997, never stated that Petitioner told Perez-Herrera what to do at all; (7) there was no evidence that Petitioner would be in charge of the proceeds of the sale of any marijuana; (8) Petitioner was no more responsible than Gilberto Perez-Herrera, Juan Mendoza or Jose Alfredo Corrales; (9) Jose Alfredo Corrales stated that the supervisor was Freddie Arriega rather than Petitioner; and, (10) Petitioner merely took Jose Alfredo Corrales to a location where marijuana was stored, and according to

Corrales, Petitioner assisted in loading the marijuana into a vehicle driven by Corrales (Tr. 2 56-270; Tr. 3 274-533).

The Government has the burden of proving, by a preponderance of the evidence, the applicability of a Guideline Section which would enhance or increase the offense level. *United States v. Shriver*, 967 F.2d 572 (11th Cir. 1992).

Pursuant to Guideline 3B1.1, there must be five or more people who were supervised or managed by the Defendant to justify an enhancement in the offense level, or the role of such Defendant must be "otherwise extensive." In reviewing the evidence, *there were not five people who Petitioner managed or supervised. Moreover, there is no finding by the District Court that Petitioner engaged in conduct, in his role, that was "otherwise extensive", as Guideline 3B1.1 requires.* Thus, pursuant to *United States v. Austin*, 54 F.3d 394 (7th Cir. 1995), this case should be remanded to the District Court for resentencing with three levels deducted. As a secondary alternative, pursuant to Guideline 3B1.1(c), at least one level must be deducted even if this Honorable Court finds that Petitioner managed five or more people. If this Honorable Court finds that Petitioner was a manager or supervisor but that Petitioner did not manage at least five people, two levels should be deducted.

Application Note Four to Guideline 3B1.1 states the following:

> "In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the Court should consider include the exercise of decision making

> authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense."

In scrutinizing the evidence adduced during the jury trial, there is hardly any evidence of decision-making authority of Petitioner; there is no evidence that Petitioner recruited any accomplices; there is no evidence that Petitioner claimed the right to a larger share of the fruits of the sale of the marijuana or of the marijuana itself; there is hardly evidence of Petitioner planning or organizing either offense as alleged in Count One or Count Two; and, there is hardly any evidence that Petitioner controlled or exercised authority over Juan Mendoza, Gilberto Perez-Herrera, or Jose Alfredo Corrales. Thus, the Government has failed to establish, by a preponderance of the evidence, that Petitioner was a manager or supervisor as set forth in Guideline 3B1.1(b).

In the case of *United States v. Owens*, 70 F.3d 1118 (10th Cir. 1995), the Tenth Circuit Court of Appeals held that the District Court improperly applied Guideline 3B1.1, even though such defendant supplied cocaine on credit to his nephews who redistributed such cocaine, with the defendant and his nephews splitting the proceeds equally, the defendant did not restrict the people to

whom his nephews could sell drugs or whom they could hire to distribute drugs to their retail customers, and the defendant did not control the place of such wholesale or retail delivery nor set retail prices.

In the case of *United States v. Vargas*, 16 F.3d 155 (7th Cir. 1994), the Seventh Circuit Court of Appeals held that the District Court improperly found that Guideline 3B1.1 applied, even though such defendant had the ability to supply cocaine, including access to the storage facility, could sell such cocaine on credit and negotiate the price, since the defendant had no more responsibility than other codefendants regarding the logistics of cocaine delivery or payments thereof, and such case was remanded for resentencing with such three level increase being deducted.

And, in *United States v. Sostre*, 967 F.2d 728 (1st Cir. 1992), the First Circuit Court of Appeals reversed the sentencing of the defendant, because the District Court improperly gave a three level upward adjustment for exercising a managerial or supervisory role in a drug transaction when such defendant acted as the "steerer" able to connect the buyers and the sellers but did not exert control over the codefendants.

Consequently, this cause should be remanded for resentencing, with the District Court directed to deduct three levels from the total offense level by deleting the three level enhancement for being a supervisor or manager.

As to the Third Question Presented, Petitioner did not receive the effective assistance of counsel during the

jury trial, and that such ineffective assistance constitutes reversible error as set forth below.

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), reversible error occurs if (1) the defendant did not, based upon the totality of the circumstances, receive the reasonably ineffective assistance of counsel, and (2) that, but for counsel's unprofessional errors, the outcome would have been different. An ineffective assistance of counsel claim must consider the totality of the evidence before the jury.

The totality of the circumstances, establishing that Petitioner did not receive the reasonably effective assistance at trial, reveals the following. First, defense counsel gave notice, pursuant to Fed.R.Crim.P. 12.3, that Defendant properly raised the defense of "public authority" (R.1 55; R.2 138-156). Indeed, Petitioner's testimony and defensive theory, namely, that Petitioner was acting under public authority, was as follows. Petitioner himself testified that he met DPS Narcotics Officer Bruce Jackson in 1996 and informed Jackson of about 200 pounds of marijuana and 10 kilograms of cocaine stashed in a truck/trailer behind a nearby golf course (Tr. Jury Trial 3 395-396); on November 15, 1996, Petitioner again talked to narcotics officer Jackson regarding Arnulfo Urias, nicknamed "Chiccaron", whose associates were getting ready to move 100 pounds of marijuana to Odessa, and insuring that Petitioner relay such information to Officer Jackson, including giving a description of the vehicles and license plate number regarding the actual transportation of such marijuana by "Chiccaron" (Tr. Jury Trial 3 397-400); Petitioner went to Mexico several times for the

purpose of providing confidential information to the narcotics officers with the Texas Department of Public Safety, including meeting with Officer Zeke Rodarte, with Petitioner taking with him a hired hand named Jesus Melendez, who would also be set up as a confidential informant (Tr. Jury Trial 3 400-408; 417); Petitioner went to Mexico four or five other times, with Officer Rodarte being aware that Petitioner was in Mexico, with Petitioner reporting to Rodarte each time he met with someone in Mexico, and that Petitioner met with Ismael Ispudo in Van Horn, Texas (Tr. Jury Trial 3 408); Petitioner went to Ojinaga to meet with Hippie Ramos, of the Ramos' drug organization, including regarding the transportation of one ton of marijuana forty miles south of Van Horn (Tr. Jury Trial 3 406-407); this transportation was supposed to have had surveillance from Officer Rodarte (Tr. Jury Trial 3 407); Petitioner gave other information to both Officer Jackson and Officer Rodarte, with Jackson acting on most of the information that Petitioner provided (Tr. Jury Trial 3 409-410); Petitioner told Officer Jackson about 1,500 pounds of marijuana that was moved by the Hippie Ramos' drug organization (Tr. Jury Trial 3 418); Petitioner went to Odessa regarding the February 4, 1997 arrest, to serve only as a confidential informant, and indeed called his brother, Don Brewster, who paged Officer Rodarte numerous times, and subsequently asked his brother if he had contacted Rodarte (Tr. Jury Trial 3 419-441), with Petitioner never knowing exactly what happened in Odessa on February 4, 1997 until February 26 or 28, 1997, when Petitioner met with Officer Jackson (Tr. Jury Trial 3 441); regarding the February 11, 1997 arrest, Petitioner received a phone call from Hippie

Ramos via Ismael Ispudo, regarding a load of marijuana coming from Chihuahua, Mexico to Odessa, and the person who received such marijuana, Jose, was a person whom Petitioner was convinced was working for Hippie Ramos (Tr. Jury Trial 3 457-461), and Petitioner was going to call Officer Rodarte and inform him of a load going down the road but was arrested by DPS Trooper Lujan before Petitioner could make such call (Tr. Jury Trial 3 462-466) on February 14, 1997; Petitioner received a call from Mr. Nieto, with Petitioner calling Officer Jackson, because the February 11, 1997 load of marijuana was apparently a Nieto load, rather than a Ramos load (Tr. Jury Trial 3 470-473).

However, and inexplicably, the trial attorney of Petitioner wholly failed to request a jury instruction on such defense of public authority pursuant to Fed.R.Crim.P. 12.3. Thus, the jury was given no option to find Petitioner not guilty, even if Petitioner was acting as an informant for the Government, if the Government proved knowledge and possession of marijuana as to both Counts One and Two.

Very importantly, the failure to request a jury instruction, as well as the failure to object to a jury instruction, can, indeed, constitute the ineffective assistance of counsel. *United States v. Myers*, 892 F.2d 642 (7th Cir. 1990). See also *United States v. Wolf*, 787 F.2d 1094 (7th Cir. 1986). Moreover, by trial counsel failing to include a jury instruction regarding the defense of public authority under Fed.R.Crim.P. 12.3, the jury was denied the opportunity to fairly and fully judge the merits of such "public authority" defense by depriving the jury of acquitting Petitioner, on both Counts One and Two, by the failure to include such defensive theory. Indeed, because the jury

had been precluded from judging the merits of such "public authority" defense, and thereby prohibited from acquitting Petitioner even if the Government proved knowing possession of marijuana with intent to distribute, Petitioner received the ineffective assistance of counsel. See *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983).

Prior to trial, the Government was ordered to produce "informant files" relating to notes and police reports made by law enforcement officers who interviewed Petitioner, with such notes to be submitted for an *in-camera* review by the United States Magistrate (R. 2 82-86; 94-95).

Indeed, Petitioner testified that he was gathering information, infiltrating, and providing assistance to DPS Narcotics regarding both the Ramos' drug organization and the Nieto drug organization, and that the man nicknamed "Chiccaron" was a suspect regarding both the Ramos drug organization and the Nieto drug organization. (R. 2 145). Moreover, at a hearing on Petitioner's Motion For New Trial, as set out below, the notes of DPS narcotics officer Jeffrey Collins were not examined by trial counsel for Petitioner, which contained the word "Chiccaron", and the "Chiccaron" notation was never revealed to the jury. The reference to "Chiccaron" in Collins' notes was, indeed, relevant to the defense of public authority because "Chiccaron" shows that Petitioner was working on the investigation of both the Ramos organization and the Nieto organization simultaneously, and that the actions taken by Petitioner as an informant for the Government, especially the DPS Narcotics, were actually taken within the defendant's authority (R. 2 8).

The Government allegedly, two to three days prior to the commencement of the jury trial, sent a copy of DPS Trooper Collins' notes by facsimile to the trial attorney for Petitioner; however, defense counsel at trial made clear that such report of Jeffrey Collins was never received (R. 2 148-149).

However, and very importantly, when DPS Trooper Jeffrey Collins was on the witness stand, as a Government witness, defense counsel objected to Collins using his notes instead of asking for a hearing, outside the presence of the jury, regarding the contents of the notes, in which trial counsel for Petitioner would have discovered the critical word "Chiccaron" (R. 2 149). Indeed, had defense counsel requested such hearing outside the presence of the jury and discovered the word "Chiccaron" handwritten by DPS Trooper Collins on his notes from the February 5, 1997 meeting with Petitioner, Petitioner could have helped establish that Petitioner, indeed, was working two separate investigations, and such notes of DPS Trooper Jeffrey Collins would have corroborated Petitioner's testimony that Petitioner was a Government informant acting within the scope of his authority. Instead, by objecting to Collins using his notes from February 5, 1997 meeting with Petitioner, the defense counsel received the relief he requested, since the District Court prohibited Collins from using his notes while testifying in front of the jury. Moreover, had trial counsel requested a hearing outside the presence of the jury and discovered the word "Chiccaron", then after Collins testified before the jury the word "Chiccaron" on Collins' notes would have revealed to the jurors, and Petitioner

could have testified on surrebuttal of the importance of the word "Chiccaron". Moreover, the importance of "Chiccaron" being on DPS Trooper Collins' notes could have been pointed out during jury argument by trial counsel for Petitioner.

Defense counsel at trial did not discover the contents of DPS Officer Collins' notes, including the word "Chiccaron", until the hearing on the Motion For New Trial (Tr. Motion For New Trial Last Hearing 2-107). As set forth above, trial counsel for Petitioner could have discovered the word "Chiccaron" on Collins' notes during his cross-examination of Trooper Collins. And, the ineffective assistance of counsel may, indeed, occur, if trial counsel fails to discover information until after the trial has concluded. *Widener v. Wainwright*, 708 F.2d 614 (11th Cir. 1983). Moreover, the failure to introduce a police report which contains exculpatory information may likewise constitute the ineffective assistance of counsel. *United States v. Torres*, 719 F.2d 549 (2nd Cir. 1983).

When combining the complete failure of trial counsel to request a jury instruction regarding the defense of public authority, as well as the trial counsel failing to request a hearing, outside the presence of the jury, and timely discover the word "Chiccaron" on the notes of DPS Trooper Jeffrey Collins at their February 5, 1997 meeting, the combined effect was so devastating to Petitioner that Petitioner did not receive the effective assistance of counsel during the trial.

As to the second prong of *Strickland v. Washington*, there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would

have been different: (1) the failure to object to an improper jury instruction, combined with one other impropriety, constitutes the ineffective assistance of counsel, *United States v. Wolf*, 787 F.2d 1094 (7th Cir. 1986), and in the case at bar, not only did trial counsel fail to request a "public necessity" instruction because Petitioner was acting as an informant for the Government, but defense counsel failed to request a hearing outside the presence of the jury and discover the word "Chiccaron" on Trooper Collins' notes, which would have corroborated Petitioner's testimony; (2) remand was ordered in *United States v. Myers*, 892 F.2d 642 (7th Cir. 1990), with a post-trial evidentiary hearing required due to the trial record itself compelling a strong inference of the ineffective representation for failure to seek a limiting jury instruction; (3) DPS narcotics officer Bruce Jackson admitted that Petitioner first provided information to Jackson in November, 1996, and that this ended in being a successful drug bust (Tr. Jury Trial 2 224); Petitioner talked with Jackson on November 25, 1996, December 4, 1996, December 6, 1996, December 9, 1996, December 10, 1996, December 22, 1996, December 28, 1996, December 29, 1996, January 2, 1997, January 13, 1997, January 20, 1997, and January 22, 1997, including Petitioner providing specific information of loads of marijuana coming in from Mexico (Tr. Jury Trial 2 224-255); (4) DPS narcotics officer Zeke Rodarte admitted that Petitioner met with Rodarte on October 4, 1996 and on October 6, 1996, with Petitioner being wired when he talked to Ismael Ispudo, a known narcotics trafficker (Tr. Jury Trial 3 337-338); Rodarte knew that Petitioner went to Mexico two or three times to gather information for DPS Narcotics (Tr. Jury Trial 3

339), and Petitioner was acting as a confidential informant when he went into Mexico to meet with known drug dealers (Tr. Jury Trial 3 349); Petitioner met with Zeke Rodarte for 1 to 2 hours on January 15, 1997, with Petitioner being debriefed by two analysts regarding illegal narcotics organizations (Tr. Jury Trial 3 345); (5) Petitioner himself testified that he met DPS Narcotics Officer Bruce Jackson in 1996 and informed Jackson about 200 pounds of marijuana and 10 kilograms of cocaine stashed in a truck/trailer behind a nearby golf course (Tr. Jury Trial 3 395-396); on November 15, 1996, Petitioner again talked to narcotics officer Jackson regarding Arnulfo Urias, nicknamed "Chiccaron", whose associates were getting ready to move 100 pounds of marijuana to Odessa, and insuring that Petitioner relay such information to Officer Jackson, including giving a description of the vehicles and license plate number regarding the actual transportation of such marijuana by "Chiccaron" (Tr. Jury Trial 3 397-400); Petitioner went to Mexico several times for the purpose of providing confidential information to the narcotics officers with the Texas Department of Public Safety, including meeting with Officer Zeke Rodarte, with Petitioner taking with him a hired hand named Jesus Meléndez, who would also be set up as a confidential informant (Tr. Jury Trial 3 400-408; 417); Petitioner went to Mexico four or five other times, with Officer Rodarte being aware that Petitioner was in Mexico, with Petitioner reporting to Rodarte each time he met with someone in Mexico, and that Petitioner met with Ismael Ispudo in Van Horn, Texas (Tr. Jury Trial 3 408); Petitioner went to Ojinaga to meet with Hippie Ramos, of the

Ramos' drug organization, including regarding the transportation of one ton of marijuana forty miles south of Van Horn (Tr. Jury Trial 3 406-407); this transportation was supposed to have had surveillance from Officer Rodarte (Tr. Jury Trial 3 407); Petitioner gave other information to both Officer Jackson and Officer Rodarte, with Jackson acting on most of the information that Petitioner provided (Tr. Jury Trial 3 409-410); Petitioner told Officer Jackson about 1,500 pounds of marijuana that was moved by the Hippie Ramos' drug organization (Tr. Jury Trial 3 418); Petitioner went to Odessa regarding the February 4, 1997 arrest, to serve only as a confidential informant and indeed called his brother, Don Brewster, who paged Officer Rodarte numerous times, and subsequently asked his brother if he had contacted Rodarte (Tr. Jury Trial 3 419-441), with Petitioner never knowing exactly what happened in Odessa on February 4, 1997 until February 26 or 28, 1997 when Petitioner met with Officer Jackson (Tr. Jury Trial 3 441); regarding the February 11, 1997 arrest, Petitioner received a phone call from Hippie Ramos via Ismael Ispudo, regarding a load of marijuana coming from Chihuahua, Mexico to Odessa, and the person who received such marijuana, Jose, was a person whom Petitioner was convinced was working for Hippie Ramos (Tr. Jury Trial 3 457-461), and Petitioner was going to call Officer Rodarte and inform him of a load going down the road but was arrested by DPS Trooper Lujan before Petitioner could make such call (Tr. Jury Trial 3 462-466); on February 14, 1997, Petitioner received a call from Mr. Nieto, with Petitioner calling Officer Jackson, because the February 11, 1997 load of marijuana was apparently a Nieto load, rather than a Ramos load (Tr.

Jury Trial 3 470-473); (6) the Eleventh Circuit Court of Appeals reversed a conviction in *Widener v. Wainwright*, 708 F.2d 614 (11th Cir. 1983) because trial counsel failed to discover certain information until after trial; and, (7) the failure to introduce exculpatory information from a police report can constitute reversible error *United States v. Torres*, 719 F.2d 549 (2nd Cir. 1983).

Accordingly, this Petition should be granted, and a new trial ordered.

CONCLUSION

For the reasons stated, this Honorable Court should summarily reverse the decision of the Fifth Circuit Court of Appeals. That decision was patently erroneous and, furthermore, Petitioner should be granted a new trial or, in the alternative, resentenced as requested above in this Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50276
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

THEODORE MICHAEL BREWSTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P-97-CR-35-1)

(Filed Mar. 03, 1999)

Before POLITZ, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Theodore Michael Brewster appeals his conviction and sentence for possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841. Brewster contends

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that the district court clearly erred by increasing his offense level under U.S.S.G. § 3C1.1 based on the court's finding that Brewster's perjured testimony was obstruction of justice; that the district court clearly erred by finding that he was a manager or supervisor and thereby increasing his offense level under U.S.S.G. § 3B1.1(B); that his trial counsel was ineffective; and that the Government violated 18 U.S.C. § 201(c)(2) by promising leniency to a Government witness in exchange for his testimony at Brewster's trial.

Brewster's contentions are without merit. The district court made sufficient findings that Brewster committed perjury at trial; accordingly, the two-level increase for obstruction of justice under U.S.S.G. § 3C1.1 was appropriate. *See* ***United States v. Strom***, 36 F.3d 1289, 1295 (5th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995). And, the district court did not clearly err by finding that Brewster supervised at least one other participant in transporting loads of marijuana. *See* U.S.S.G. § 3B1.1(b), comment. (n.2); ***United States v. Mir***, 919 F.2d 940, 945 (5th Cir. 1990). Brewster's ineffective assistance of counsel claim was not raised in district court, and the record is not sufficiently developed for us to consider it for the first time on appeal. *See* ***United States v. Navejar***, 963 F.2d 732, 735 (5th Cir. 1992). Finally, Brewster's contention that the Government violated 18 U.S.C. § 201(c)(2) by promising leniency to a Government witness in exchange for his testimony at Brewster's trial, also raised for the first time on appeal, is foreclosed by our precedent. *See* ***United States v. Webster***, 162 F.3d 308, 357-58 (5th Cir. 1998); ***United States v. Haese***, 162 F.3d 359, 366 (5th Cir. 1998).

AFFIRMED

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III **TEL. 504-589-6514**
CLERK **600 CAMP STREET**
NEW ORLEANS, LA 70130

March 3, 1999

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 98-50276 USA v. Brewster
USDC No. P-97-CR-35-1

Enclosed is a copy of the court's decision, and judgment has been entered under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P.'s 39 through 41, and 5TH CIR. RULES 35, 39 and 41 govern costs, rehearings, and mandates. **New 5TH CIR. RULES 35.2.10 and 40 require that a copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing or suggestion for rehearing en banc as an appendix but shall not be marked or annotated**. Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions

which may be imposed if a nonmeritorious suggestion for en banc is made.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 shall not be grant simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme Court. Otherwise, the motion may be denied and the mandate issued immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for *certiorari* in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Yolanda Jett
Yolanda Jett, Deputy Clerk

Enclosure
Mr Joseph H Gay Jr
Mr Mark Randolph Stelmach
Mr Thomas S Morgan

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Guideline 3B1.1 states the following:

"*Aggravating Role.* Based on the defendant's role in the offense, increase the offense level as follows: (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels. (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increased by 3 levels. (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels."

2. Guideline 3C1.1 states the following:

"*Obstructing or Impeding the Administration of Justice.* If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels."

3. 18 U.S.C. § 201 states the following:

"(a) For the purpose of this section – (1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; (2) the term "person who has been selected to

be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and, (3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit. (b) Whoever – (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent – (A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for commission of any fraud, on the United States; or (c) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or, (c) being induced to do or omit to do any act in violation of the official duty of such official or person; (3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or

promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; (4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom; Shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States. (c) Whoever – (1) otherwise than as provided by law for the proper discharge of official duty – (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person; (2) directly or indirectly, gives,

offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom; (3) directly or indirectly, demands, seeks, receives, accepts or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom; Shall be fined under this title or imprisoned for not more than two years, or both. (d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying. (e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

Rule. 12.3. Notice of defense based upon public authority

(a) Notice by defendant; government response; disclosure of witnesses.

(1) Defendant's Notice and Government's Response. A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk. Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a Federal intelligence agency, the copy filed with the clerk shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of Witnesses. At the time that the Government serves its response to the notice or thereafter, but in no event less than twenty days before the trial, the attorney for the Government may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the

Government's demand, the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney for the Government shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the Government intends to rely in opposing the defense identified in the notice.

(3) Additional Time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.

(b) Continuing duty to disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.

(c) Failure to comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.

(d) Protective procedures unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.

(e) Inadmissibility of withdrawn defense based upon public authority. Evidence of an intention as to which was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.